IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:

LAP TIEN NGUYEN	:	BANKRUPTCY NO. 95-19872
VOC THI NGUYEN	:	ADVERSARY NO. 97-444
Debtors	:	

THE UNITED STATES OF AMERICA, on behalf of the Internal Revenue Service	:	CIVIL ACTION
Appellant	:	
	:	
v.	:	
	:	
LAP TIEN NGUYEN	:	
VOC THI NGUYEN	:	NO. 98-5068
Appelles	:	

LAP TIEN NGUYEN	:	CIVIL ACTION
VOC THI NGUYEN	:	
Appellants	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE	:	NO. 98-5350
Appellee	:	

MEMORANDUM AND ORDER

Fullam, Sr. J. July , 1999

These are cross-appeals from an order of the Bankruptcy Court which determined, in an adversary proceeding, (1) that certain tax obligations of the debtors-taxpayers for the years 1984, 1985 and 1990 were excepted from discharge pursuant to §523(a)(1)(C) of the Bankruptcy Code; but (2) that the asserted tax liabilities for the years 1984 and 1985 were invalid because

of the failure to provide timely and adequate notice of deficiency, as required by 26 U.S.C. §6212(a). The taxpayers appeal from the former ruling, and the government appeals from the latter.

On the dischargeability issue, the bankruptcy judge found as a fact that the returns for 1984 and 1985 were indeed fraudulent, and that the taxpayers attempted to evade payment of their 1990 taxes. There is ample evidentiary support for those findings; no contrary conclusion is rationally supportable, given the huge discrepancies between income received and income reported, the failure to keep adequate records or to disclose substantial cash income, the attempt to avoid collection of taxes admittedly due, etc. On that issue, the order appealed from must be affirmed, (Civil Action No. 98-5350).

I conclude, however, that the Bankruptcy Court erred in its ultimate ruling that the government did not exercise due diligence in providing the taxpayers with a timely notice of deficiency. The taxpayers operated a drugstore in California. Their tax returns for the years in question (1984 and 1985) disclosed their California residence address. Their returns came under scrutiny, and they were subjected to audit. After the audit disclosed substantial amounts of unreported income and other irregularities, but before the audit could be completed, the taxpayers closed their business and moved to Pennsylvania,

without informing the Internal Revenue Service or their tax preparer, and without leaving a forwarding address. The notice of deficiency was mailed to their last known address in February 1989, but was returned by the postal authorities. The tax-preparer was contacted, but was unable to provide a current address for the taxpayers.

At trial, the taxpayers presented the testimony of an IRS employee named Debra Gascard, in an attempt to show what efforts could have been made by the IRS, using information from its own internal files, to ascertain a current address of the taxpayers. On cross-examination, government counsel, over the objection of the taxpayers, elicited testimony from Ms. Gascard to the effect that a computer-search of the IRS files had in fact been conducted, and failed to produce a current address for the taxpayers. Counsel for the taxpayers objected on the ground that the documents relied upon by the witness had not previously been disclosed by the government. Government counsel apparently conceded that he had been remiss in failing to disclose the entire file to opposing counsel. The court overruled the taxpayers' "foundation" objection to Ms. Gascard's testimony in view of her thorough familiarity with IRS procedure and records. When asked whether he intended to introduce the computer documentation into evidence, counsel for the government stated that, since the document had not been properly produced in

advance of trial, he would not offer it in evidence.

When the evidentiary record closed, the court invited additional briefing on the admissibility of Ms. Gascard's testimony. After the parties submitted requests for findings of fact and conclusions of law, the bankruptcy judge ruled that, in view of Ms. Gascard's testimony, the government had shown it had made reasonable efforts to ascertain the last known address of the taxpayers. But, the court concluded, Ms. Gascard's testimony about the computer searches should not have been admitted in evidence and should be stricken from the record. The court therefore reached the ultimate conclusion that the deficiency notice was invalid, because of the failure to make reasonable efforts to locate the taxpayers' correct address.

The government made a timely motion to reopen the record so that it could introduce into evidence the documentary support for Ms. Gascard's testimony, which the court had now decided was essential to the admissibility of that testimony. The motion was denied. This appeal followed.

For several reasons, I believe the order appealed from must be reversed. When the evidentiary record closed, Ms. Gascard's testimony was on the record. Although the documentary support for that testimony had been objected to because of the government's failure to disclose it sufficiently in advance of trial, the oral testimony of the witness was objected to only on

the ground of "lack of foundation." At no point was any of this evidence objected to on hearsay grounds. But the ultimate ruling of the court was that the testimony should be stricken because it was hearsay. If the written record had been offered in evidence it would presumably have qualified as a business record or official record, and would not have been excludable on hearsay grounds. Assuming, however, that the witness' testimony based on the contents of that business record might properly be characterized as hearsay, the testimony was not objected to on that ground. And whatever the merits of the hearsay argument, it strikes me as decidedly unfair to the government to refuse to reopen the record to introduce a document (the authenticity of which has never been questioned) which, as a result of a post-trial ruling, suddenly assumed critical importance. At the very least, therefore, a new trial would be in order.

I conclude that remand is unnecessary, however, because the Bankruptcy Court (perhaps led astray by the failure of the parties adequately to address the point) seems to have overlooked the proper allocation of the burden of proof. It was the taxpayers' responsibility to notify the IRS of any change in address. Tadros v. Commissioner, 763 F.2d 89, 91 (2d. Cir. 1985). Here, the taxpayers not only failed to notify the IRS of their change of address, but are properly chargeable with having actively attempted to conceal their whereabouts from the IRS.

For example, they not only absconded from California in the midst of a tax audit, but they also failed to file income tax returns for several years after reaching Pennsylvania.

And, of particular importance here, the burden of proof was upon the taxpayers to demonstrate that the IRS had failed to exercise reasonable diligence in ascertaining their correct address. Armstrong v. Commissioner, 15 F.3d 970 (10th Cir. 1994); Cyclone Drilling Inc. v. Kelley, 769 F.2d 662, 664 (10th Cir. 1985). Even after the post-trial striking of the testimony of Ms. Gascard, the remaining evidence simply does not suffice to establish that the IRS failed to exercise reasonable diligence. The deficiency notice was sent to the only address supplied by the taxpayers. Their tax-preparer could provide no further information. Absent some showing by the taxpayers that the IRS could have learned of a current address from its own files (or from some other source), there is simply no basis for invalidating the deficiency notice.

An Order follows.

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UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE	:	NO. 98-5350
Appellee	:	

ORDER

AND NOW, this day of July, 1999, IT IS ORDERED:

The Order appealed from is AFFIRMED IN PART AND REVERSED IN PART, as follows:

1. The ruling that the debtors' tax liabilities for the years 1984, 1985 and 1990 are excepted from discharge pursuant to §523(a)(1)(C) of the Bankruptcy Code is AFFIRMED.

2. The ruling that the government failed to provide timely notice of deficiency with respect to the tax liabilities for the years 1984 and 1985 is REVERSED.

John P. Fullam, Sr. J.